BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In Pennsylvania, the legislature has set up a tenure system for teachers and other professional employees, which provides in part as follows (Tenure Act of June 20, 1939, P. L. 482, Sec. 2, (24 P. S. 1126)):

> "(a) The only valid causes for termination of a contract entered into with a professional employe in accordance with the provisions of this section shall be * * * immorality, *incompetency*, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe.
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> "In determining whether a professional employe shall be dismissed for *incompetency*, the professional employe shall be rated by an approved rating system which shall give due consideration to personality, preparation, technique, and pupil reaction, in accordance with standards and regulations for such scoring as defined by rating cards to be prepared by the Department of Public Instruction immediately following the effective date of this act, and to be revised, from time to time, by the Department of Public Instruction with the cooperation and advice of a committee appointed by the Superintendent of Public Instruction, including representation from county and district superintendents of schools, classroom teachers, school directors, school supervisors, and such other groups or interests as the Superintendent of Public Instruction may deem appropriate * * *
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> "No teacher shall be dismissed under this act unless such rating records have been kept on file by the board of school directors."

The School Code of May 18, 1911 (P. L. 309, 24 P. S. 1162), which is also part of the general tenure system, provides:

> "Whenever a teacher is prevented by sickness or some other unavoidable circumstance from following

> his or her occupation, the school district may, at the discretion of the directors, make such payments of compensation during the period of absence from duty as the exigencies of the case may seem to warrant: Provided, That in the case of sickness, no payments shall be made unless such teacher shall have furnished to the board of school directors a certificate from a physician stating the nature of the sickness and certifying that he or she was unable to perform duties as a teacher."

and Section 1209, 24 P. S. 1128, provides:

> "Any principal or teacher who, unless released by the board of school directors, refuses or neglects to teach through the term for which he was engaged, except when prevented by personal illness, shall be disqualified from teaching in any public school in this Commonwealth during the term of said contract."

The Superior Court of Pennsylvania (R. 75) construed the term "incompetency," as used in the Tenure Act, *supra*, to embrace "lack of physical ability". It is recognized that the statutory construction of that term is binding upon this Court. However, the Superior Court also concluded that there was no "abuse" in the administrative process of determining whether there existed a "substantive basis" for dismissal. Thus, the Superior Court not only construed the statutory term "incompetency", but concluded that there was no discrimination against the petitioner because of marriage or pregnancy (R. 76-77).

Petitioner respectfully maintains that the learned Superior Court and Supreme Court of Pennsylvania, erred in the conclusion that the Board of Directors of the Bethlehem School District did not act in a discriminatory and arbitrary manner so as to deny the petitioner the "equal protection of the laws" guaranteed by the fourteenth amendment of the United States Constitution.

The Court's attention is respectfully invited to the following allegations made in the appeal to the Superintendent of Public Instruction (R. 43) which are undenied and therefore must be accepted as facts:

"20. That the resolution of the School District is contrary to the public policy and public welfare of the Commonwealth of Pennsylvania, in that it places abnormal restrictions upon married female teachers lawfully holding professional contracts with the School District of the City of Bethlehem.

"21. That the aforesaid resolution is unjust, inequitable, and discriminatory in that the Bethlehem School District has in the past accorded sick leaves in cases similar to the one in issue.

"22. Your Petitioner further maintains that the present proceeding is founded in bad faith and is one of a series of acts perpetrated by the Bethlehem School District in an attempt to intimidate, demoralize and coerce all married female teachers into resigning, and respectfully submits the following pertinent facts in support thereof, to wit:

"(a) A proceeding similar to the one at bar was instituted by the Bethlehem School District against your Petitioner on October 26, 1939 which was decided on January 23, 1940, adversely to the Bethlehem School District.

"(b) A newspaper campaign was instituted by the Bethlehem School District during the months of June and July, 1940, threatening the dismissal of all married female teachers unless they resigned.

"(c) The Bethlehem School District sent registered letters, under date of June 29, 1940, to thirty-three married female teachers, requesting resignations on or before July 15, 1940, a sample copy of which is hereto attached, marked Exhibit "J", and expressly made a part hereof.

It is respectfully submitted that these averments sufficiently raise the Federal constitutional questions. *Columbia Water Power Company* v. *Columbia Electric Street Railway, Light & Power Co.*, 172 U. S. 475.

These allegations, which remain undenied, clearly reveal the arbitrary and discriminatory action of the Board of Directors of the Bethlehem School District. They refute the Superior Court's finding of impartiality and lack of abuse and substantiate the petitioner's allegation that she was being discriminated against solely because of the fact that she was a married professional employee temporarily disabled by reason of the incidence of childbirth. Petitioner maintains that because of the condition peculiar to her sex and marital status, she has been discriminated against and denied the equal protection of the laws guaranteed to all individuals regardless of sex or marital status by the fourteenth amendment to the Federal Constitution.

This Court has held in *Pierre* v. *Louisiana*, 306 U. S. 354, that where a question of the deprivation of a constitutional right by the action of state officials involves the conclusions reached by the state court, whose decision is being reviewed, upon the questions of fact involved, such conclusions are not controlling and it is the duty of the Supreme Court to make independent inquiry and determine the disputed facts.

The *Pierre* case is analogous to the case at bar. There, the petitioner, a negro, alleging exclusion of negroes from the Grand Jury which indicted him, did not maintain that the Louisiana laws required an unconstitutional exclusion of negroes but maintained that Louisiana, acting through its administrative officers, had deliberately and systematically excluded negroes.

The Louisiana Supreme Court concluded that the petitioner failed to establish that negroes were excluded on account of race, but that their exclusion was the result of a bona fide compliance by the Jury Commission with State

laws prescribing jury qualifications. This Court at page 358 said:

> "The fourteenth amendment intrusts those who because of race are denied the equal protection of the laws in a State first 'to the revisory power of the higher courts of the State and ultimately to the review of this Court'."

In the case at bar, petitioner does not allege that the Tenure Act or that the State court's interpretation of the term "incompetency", are unconstitutional, but only that the application and administrative action of the Bethlehem School District has been "abused" and is unconstitutional.

A similar situation arose in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, wherein it was alleged that an ordinance, although not void on its face, was nevertheless void by reason of the administration which operated so unequally as to punish one for what is permitted to others without any distinction of circumstances.

Mr. Justice Matthews, speaking for the Court, said at page 373:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the

broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; Ex Parte Virginia, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703."

Petitioner does not maintain that the Board of Directors of the Bethlehem School District is without power to adopt reasonable rules and regulations governing maternity leaves and sick leaves, nor that the Bethlehem Board is without authority to dismiss a professional employee for incompetency due to lack of physical ability to perform. But it is respectfully urged that since the Bethlehem District engages married female professional employees without imposing upon them any special restrictions concerning childbirth, they are entitled to the same reasonable privileges of sick leave as are other employees who become temporarily disabled by reason of other illness and accident. Although the State Court has said that the determination of what constitutes lack of physical ability is discretionary with the board, it also recognized that the determination must be free from "abuse" (R. 77).

The Tenure Act, *supra*, does not distinguish between male and female employees, nor between married and single employees. Hence, it is maintained that there is no difference in fact or law between a temporary disability occasioned by an automobile accident and one occasioned by reason of pregnancy. The Bethlehem Board could not, and therefore did not, deny petitioner's allegation (R. 43) that

leaves of absence were granted under circumstances similar to the one at bar.

It is therefore respectfully submitted that the instant case is ruled by *Yick Wo* v. *Hopkins, supra,* and by *Skinner* v. *Oklahoma,* 316 U. S. 534, wherein this Court recently reiterated that when a law lays an unequal hand on those who have committed "intrinsically the same quality of offense * * * it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." See also *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23; *Indiana* v. *Brand,* 303 U. S. 95.

The Superior Court in its opinion (R. 76-77) stated that the petitioner was not being discriminated against because of her marriage, nor was her dismissal due to her legitimate pregnancy, but because she became incompetent due to her condition. The State Court accepted the Board's argument that petitioner's pregnancy was only a circumstance which in no way influenced its action. It is respectfully submitted that this is specious reasoning and is an obvious attempt to circumvent the real issue.

In *West Virginia State Board of Education* v. *Barnette, et al.,* 87 L. Ed. Adv. Ops. 1171, the West Virginia Board of Education adopted a resolution requiring all children to salute the flag. Failure to conform was construed to be "insubordination" dealt with by expulsion. Readmission was denied until compliance and if the child refused to comply, action could be taken against the child and his parents for delinquency.

If the State Court's reasoning in the instant case is translated to the *Barnette* case, it could be maintained that the failure to salute *was only an incident* to the child's insubordination. Any action taken against the child was due to insubordination and the consequent delinquency, and not because of failure to salute the flag.

The *Barnette* decision definitely brought the actions of Boards of Education within the scrutiny of this Court. It was stated thus:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

The policy of our laws favors marriage and the birth of children. There is no provision in the Tenure law of Pennsylvania, nor in any other statute, nor any principle of the common law, which justifies the inference of a public policy which concededly sanctions the employment of married women as teachers and considers as grounds for expulsion the act of a married woman in giving birth to a child. Married women being lawfully employed as teachers and excusable for absence caused by personal illness, the idea that because the illness resulting in absence is caused by maternity it therefore becomes "incompetency" or "neglect of duty" is repugnant to the basic law of the land and good morals.

This Court has recognized that "marriage and procreation are fundamental to the very existence and survival of the race", (*Skinner* v. *Oklahoma, supra*), and that the fourteenth amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions which, not infrequently, are designated as "the law of the land" (*Buchalter, et. al.*, v. *New York; Weiss* v. *New York; Capone* v. *New York*, 87 L. Ed. Adv. Op. 1088, 63 Sup. Ct. Rep. 1129).

Conclusion.

In conclusion, it is urgently maintained that the petitioner was deprived of the equal protection of the laws

guaranteed by the fourteenth amendment to the Federal Constitution by the action of the Board of Directors of the Bethlehem School District in denying her a leave of absence for maternity, contrary to an established policy to grant leaves of absence for other illness and accident. It is maintained that such action is an attack upon the sacred institution of marriage and motherhood.

Respectfully submitted,

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